Supreme Court, U.S.
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98 314 AUG 2 1 1998

No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

JIM MATTSON,

Petitioner,

v.

THOMAS O. SCHULTZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED

Is it the duty of a trial judge to instruct a jury in an age discrimination case in some fashion concerning the paradigm rules of fair inference set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 742 (1973)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 3

I. THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO SET FORTH THE APPROPRIATE INSTRUCTIONS TO BE PROVIDED A JURY IN ALL CASES INVOLVING ALLEGATIONS OF DISCRIMINATION BROUGHT PURSUANT TO THE FEDERAL LAWS MADE AND PROVIDED WHERE THE JURY IS TO APPLY THE STANDARDS OF *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 742 (1973) TO THE FACTS 3

II. THE HOLDING IN *GEHRING V. CASE CORP.*, 43 F.3D 340 (7TH CIR. 1974), AS INTERPRETED IN THE CASE AT BAR IS IN CONFLICT WITH THE STANDARD INSTRUCTION AND THE INSTRUCTION APPROVED BY THE EIGHTH CIRCUIT 14

CONCLUSION 16

APPENDIX

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT .....App. 1

AMENDED JUDGMENT IN A CIVIL CASE DATED AUGUST 29, 1997 .....App. 2

TABLE OF CONTENTS – Continued

Page

DECISION AND ORDER DATED AUGUST 29, 1997 .....App. 3

MOTION FOR NEW TRIAL.....App. 4

SPECIAL VERDICT .....App. 5

INSTRUCTION ON THE ADEA LAW GIVEN BY THE TRIAL COURT TO THE JURY.....App. 6

TABLE OF AUTHORITIES

Page

CASES:

Bethea v. Levi Strauss & Co., 827 F.2d 355 (8th Cir. 1987) 10, 11

Douglass v. Mandeville & McAllister, 7 U.S. 298, 3 Cranch 298, 2 L.Ed. 445 (1806) 3

Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1974) .. 8, 14

Leon v. Caterpillar Indus. Ins., 69 F.3d 21326 (7th Cir. 1995) 3

McDonnell Douglas Corp. v. Green, 411 U.S. 742 (1973) ..... *passim*

Ryther v. KARE 11, 108 F.3d 832 (8th Cir.) cert. denied, ___U.S.___, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997) 14

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1998) .. 8, 12

Tolan v. Levi Strauss & Co., 867 F.2d 467 (1989) .. 9, 10, 11

Turner v. Yates, 57 U.S. 14, 6 How. 14, 14 L.Ed. 824 (1853) 3

U.S. v. Hill, 738 F.2d 152 (6th Cir. 1984) 12

STATUTES:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 623(f) 2

OTHER CITATIONS:

Rule 59, Federal Rules of Civil Procedure 2, 3

FEDERAL JURY PRACTICE & INSTRUCTIONS – CIVIL, Devitt, Blackmar & Wolff – Fourth Edition WEST PUBLISHING CO. 1987 4

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jim Mattson, respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Seventh Circuit entered in this case on May 27, 1998.

OPINION BELOW

The Decision of the United States Court of Appeals for the Seventh Circuit dated May 27, 1998 affirmed the Decision and Order of the United States District Court for the Eastern District of Wisconsin filed August 29, 1997. The Decision of the United States Court of Appeals for the Seventh Circuit is reprinted at App. 1 to 8 of the Appendix to this Petition. The Decision and Order of the United States District Court for the Eastern District of Wisconsin is reprinted at App. 10 to 13 of the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered its decision on May 27, 1998 affirming the Decision and Order of the United States District Court for the Eastern District of Wisconsin dated August 29, 1997. The jurisdiction of this Court to review the Decision of the United States Court of Appeals for the Seventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Age Discrimination in Employment Act, 29 U.S.C. § 623(f). This case involves Rule 59 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

On January 17, 1995 Jim Mattson filed a complaint in the United States District Court for the Eastern District of Wisconsin under diversity jurisdiction asserting claims of malpractice and misrepresentation against Attorney Thomas Schultz in connection with Attorney Schultz's representation of Mr. Mattson in an age discrimination case. Mr. Mattson's claims were tried before a jury between March 31, 1997 and April 9, 1997. At the conclusion of the case the trial judge submitted the special verdict to the jury. The first question of the special verdict inquired as to whether or not the petitioner's employer, Green Bay Broadcasting Company, had discriminated against the petitioner because of his age in violation of the Age Discrimination in Employment Act. Petitioner's counsel requested that the jury be instructed concerning the standard set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 742 (1973). The trial court declined and provided instructions to the jury as set forth at App. 23 to 27 of the Appendix to this Petition. The jury answered the first question – NO – finding that the petitioner had not been discriminated against on the basis of his age by his employer. On April 28, 1997 petitioner filed a Motion For A New Trial pursuant to Federal Rule of Civil Procedure

59. On August 29, 1997 the District Court denied the Motion. The Decision and Order denying the Motion is reprinted at App. 10 to 13 of the Appendix to this Petition. Petitioner timely appealed to the United States Court of Appeals for the Seventh Circuit. On May 27, 1998 the United States Court of Appeals for the Seventh Circuit affirmed the District Court. The Decision of the United States Court of Appeals for the Seventh Circuit is reprinted at App. 1 to 8 of the Appendix to this Petition.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THIS CASE AFFORDS THE UNITED STATES SUPREME COURT AN OPPORTUNITY TO SET FORTH THE APPROPRIATE INSTRUCTIONS TO BE PROVIDED A JURY IN ALL CASES INVOLVING ALLEGATIONS OF DISCRIMINATION BROUGHT PURSUANT TO THE FEDERAL LAWS MADE AND PROVIDED WHERE THE JURY IS TO APPLY THE STANDARDS OF *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 742 (1973) TO THE FACTS.

It is an axiomatic principle of this legal system that a judge in a jury trial should instruct the jury on the law and every point pertinent to the issues. *Turner v. Yates*, 57 U.S. 14, 6 How. 14, 14 L.Ed. 824 (1853), *Douglass v. Mandeville & McAllister*, 7 U.S. 298, 3 Cranch 298, 2 L.Ed. 445 (1806). The jury instructions are to guide the jury in the application of the correct principles of the law of the case before them. *Leon v. Caterpillar Indus. Ins.*, 69 F.3d 1326 (7th Cir. 1995).

In the case at bar the plaintiff-petitioner requested the standard jury instruction on the *McDonnell Douglas Corp. v. Green* inferences as set forth in Sec. 106.03 *FEDERAL JURY PRACTICE & INSTRUCTIONS – CIVIL*, Devitt, Blackmar & Wolff – Fourth Edition WEST PUBLISHING CO. 1987 as follows:

> It is unlawful for an employer to discriminate against an employee because of that person's age.
>
> In order for you to find for the plaintiff, the plaintiff must prove by a preponderance of the evidence that his age was a determining factor in the defendant's decision to discharge him. Plaintiff need not prove that age was the sole or exclusive motivation for defendant's discharge decision. Age is a determining factor if plaintiff would not have been discharged except for his age.
>
> Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.
>
> In deciding whether the plaintiff's age was a determining factor in defendant's decision to discharge him, you should first consider whether plaintiff has established the following facts:
>
> (Here insert the factual elements that would constitute the plaintiff's prima facie case, e.g.,
>
> First: The plaintiff was within the protected age category, that is, he was forty years of age or over;

Second: Plaintiff's performance met the expectations of the employer;

Third: The plaintiff was terminated from the job; and

Fourth: A younger person was hired in plaintiff's place (or the job remained open).)

If plaintiff has proven these facts, he has proven enough so that you may, but you need not, render a verdict in his favor. If the plaintiff has failed to prove one or more of these facts, you must find for the defendant.

If you find that plaintiff has proven these facts and that the defendant has not produced a reason other than age for the discharge, then you must find for the defendant.

If, on the other hand, defendant has produced evidence of a reason other than age for discharging plaintiff, you must find for the defendant unless you find, considering all the evidence in the case, that plaintiff has proved that the reason given by the defendant was not the true reason for plaintiff's discharge, or that the plaintiff's age more likely than not was a determining factor in his discharge. (Emphasis supplied)

The trial court refused to include Sec. 106.03 in its charge and in the instruction given made no statement paraphrasing the *McDonnell Douglas Corp. v. Green* standards. See App. 23 to 27. In its decision denying the Motion For A New Trial the District Court stated:

> Finally, the Plaintiff renews his argument, first made at trial, that the jury should have been instructed on the test for a *prima facie* case of

> employment discrimination as set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). At trial, Mattson met his burden of supporting a *prima facie* case of age discrimination. However, the Defendant then met his burden of articulating a nondiscriminatory reason for the radio station's firing of Mattson. It is well-established that, at this point, the *McDonnell Douglas* framework drops out of a discrimination case and the jury need be instructed and asked to render a verdict only as to the ultimate question – whether age was a factor in the employer's decision to fire the Plaintiff. *See Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 668 (7th Cir. 1997); *Pilditch v. Board of Education of City of Chicago*, 3 F.3d 1113, 1116 (7th Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994). Mattson's jury answered this question 'no.' Under the applicable law, Mattson was not entitled to a jury instruction or special verdict interrogatory based on the *McDonnell Douglas* framework, so a new trial will not be granted on this ground. (App. 12 to App. 13)

It is clear then beyond any doubt that the District Court intentionally and specifically omitted from its charge to the jury the *McDonnell Douglas Corp. v. Green* standards.

In affirming the District Court Judge Cudahy writing for the Seventh Circuit asserted:

> The plaintiff's principal arguments on appeal, as stated most directly in the heading of his appellate brief, are that 'under the circumstances, where the district court not only conducted the 'case within a case' but submitted a special verdict question directed to the 'case within a case'

it was error not to instruct the jury on the standards of a prima facie case set forth in *McDonnell Douglas v. Green*[,411 U.S. 792, 802 (1973),] and to submit a special verdict question phrased as a double negative.' Br. & App. of Pl.-Appellant 1, The question whether the jury should have been instructed on the elements of a prima facie case of age discrimination is resolved conclusively against the plaintiff's position by *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). The plaintiff would distinguish *Gehring* on the basis that it was not a legal malpractice case; the plaintiff thinks that an understanding of the prima facie case would have helped the jury understand the strength of his case. But the strength of his legal malpractice case was no greater than the strength of his underlying age discrimination claim. '[T]he merits of the malpractice action depend upon the merits of the original claim.' *Lewandowski*, 276 N.W.2d at 287. The principles of age discrimination law determine the proper jury instructions regarding the case within a case, see id. at 289, so *Gehring* controls. Since the jury found for the defendant on the threshold age discrimination question, we need not decide whether the prima facie case might have been relevant to the issue of negligence. (App. 3 to App. 4)

In *Gehring*, Judge Easterbrook declared:

Gehring's other arguments concern the jury instructions. He wanted the judge to talk the jury through the paradigm established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The judge declined, for the very good reason that the

> Supreme Court has held that this burden-shifting model applies to pretrial proceedings, not to the jury's evaluation of evidence at trial. . . . (Emphasis supplied)

The interpretation of *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1974), by the opinion of the Court of Appeals in the case at bar cannot be reconciled with either common sense or precedent. A jury that is not instructed on the law concerning critical issues before it is operating in the dark. In 1990 Judge Posner for the United States Court of Appeals for the Seventh Circuit rendered a thorough analysis of the application of *McDonnell Douglas Corp. v. Green* to age discrimination litigation. In *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1998) he wrote:

> The district judge acknowledged that, for the purpose of his deciding whether *Shager* made out a prima facie case of discrimination by the method authorized for race cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and extended to age cases in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980) (per curiam), Asgrow's retaining young Schradle while discharging old Shager was the equivalent of replacing an old by a young worker. *Oxman v. WLS-TV*, 846 F.2d 448, 453-56 (7th Cir. 1988); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 95-97 (7th Cir. 1995)
>
> . . . But the fact that an older worker is treated worse than a younger one – here, that Shager was (in effect) replaced by a younger man – is not enough to establish a prima facie case of age discrimination. Shager was required to show that his performance in the job was

> adequate. *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 462-63 (7th Cir. 1986).
>
> . . . Under the approach of *McDonnell Douglas*, applied to age discrimination cases, once the employee shows that he was replaced by a younger person even though he was performing up to his employer's expectations, the burden shifts to the employer to present evidence that the employee was replaced for a reason unrelated to his age or that of his replacement.
>
> . . . If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind *the rule* of McDonnell Douglas.

And finally:

> . . . we shall not subvert the Act (ADEA) by upholding precipitate grants of summary judgment to defendants.

Now by the mechanism of withholding from juries in the Seventh Circuit the principles set forth in *McDonnell Douglas Corp. v. Green* and the standard instruction Sec. 106.03 the Act is more clearly subverted. How can a jury know the principles outlined by Judge Posner in *Shager* without instruction from the Court?

An analysis of cases from the United States Court of Appeals for the Eighth Circuit belie the position of the Seventh Circuit that a jury should not be instructed regarding the *McDonnell Douglas Corp. v. Green* criteria. In *Tolan v. Levi Strauss & Co.*, 867 F.2d 467 (1989) facts

remarkably similar to those in the underlying case at bar are recited.

> Tolan had more years experience in sales than the two younger sales people who were retained. Further, while at Levi, Tolan's supervisors gave Tolan excellent ratings on his appraisals. Tolan also received numerous awards for his job performance. In fact, Levi gave Tolan a Distinguished Service Award just a few months before Levi terminated Tolan.
>
> Although projections for 1984 showed national sales of Levi tops would fall, Levi increased Tolan's sales target by several percentage points. The record also shows Ireton had been concerned about the high cost of sales in the region that contained Tolan's territory. Ireton indicated that because of the 'seniority' of employees, salaries were higher in this region than in other regions. Further Levi made the decision to terminate Tolan before conducting the OJQ (Objective Job Quotient). Under these circumstances, the jury could have viewed the OJD process as a sham. From all the evidence in the record, the jury reasonably could have concluded that age was a determining factor in Levi's decision to fire Tolan. . . . 867 F.2d at 469-470.

Implicit in the *Tolan* court analysis is that the jury was instructed with respect to the *McDonnell Douglas Corp. v. Green* criteria. Without such instructions it would be impossible for the jury to apply those principles to the facts.

In the *Tolan* companion case, *Bethea v. Levi Strauss & Co.*, 827 F.2d 355 (8th Cir. 1987) the point is made more emphatically:

> As the Supreme Court has said the 'ultimate factual issue' in cases such as this is whether the employer intentionally discriminated against the employee. *United States Postal Service v. Aikens*, 460 U.S. 711, 714-15, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403.
>
> On appeal 'because the case was fully tried on the merits, we focus our attention on the ultimate question presented and not on the adequacy of a party's showing at any particular stage of the analysis set down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 664 (1973) as applied in an age discrimination case.'
>
> Once a finding of discrimination vel non has been made and the resulting judgment is being evaluated on appeal, [the] presumptions [described in *McDonnell Douglas*] fade away, and the appellate court should simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial. This is the teaching of *Aikens*. *Barber v. American Airlines, Inc.*, 791 F.2d 658, 660 (8th Cir.) cert. denied ___U.S. ___, 107 S.Ct. 278, 93 L.Ed.2d 254 (1986). (Underlining supplied)

It is clear from *Bethea* and *Tolan* that it is essential for a jury to be instructed concerning the *McDonnell Douglas* criteria in some fashion. Of course, after the jury has decided the *McDonnell Douglas* presumptions "fade away" and an appellate court simply studies the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial.

Therefore, the *Gehring* decision and the decision of the Seventh Circuit Court of Appeals in the case at bar have reversed longstanding principles concerning instructions to juries in discrimination cases. To refuse to provide a jury with instructions explaining the concepts of *McDonnell Douglas* is in effect to misinform the jury concerning the evidence presented. It may be difficult, but it is necessary to "dance through the *McDonnell Douglas* quadrille" as Judge Posner put it in *Shager v. Upjohn*.

Would anyone seriously question that it is clear error to fail to charge a jury in a criminal case on the presumption of innocence? As the Sixth Circuit stated in *U.S. v. Hill*, 738 F.2d 152 (6th Cir. 1984):

> Jury instructions concerning the presumption of innocence and proof beyond a reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States . . . .

In a like fashion jury instructions concerning the standards of *McDonnell Douglas Corp. v. Green* in a case brought under the Age Discrimination in Employment Act can be said to be a fundamental right possessed by every party attempting to vindicate his or her rights under the federal discrimination laws.

The refusal to provide the appropriate instructions was compounded by the trial court when it submitted the question to the jury in the form of a double negative:

> Would Green Bay Broadcasting Company not have discharged James Mattson if Mr. Mattson had been younger than 40 years of age and everything else had remained the same? (App. 16)

The opinion of the Court of Appeals excuses the double negative special verdict question as legally appropriate in the following fashion:

> Under Rule 49(a) of the Federal Rules of Civil Procedure, the formulation of special verdict questions is a matter within the discretion of the trial court. See *United States Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988). The role of appellate review is to ensure that questions accurately, adequately and clearly state the relevant issues. Ambiguous, biased, misleading or confusing questions may warrant reversal. *See id.; see also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 377 (7th Cir. 1996)); *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209, 214 (7th Cir. 1995); James Wm. Moore et al., *Moore's Federal Practice* 49.11[2][b] (3d ed. 1997). Mattson does not specify any reason why the special verdict question is defective other than the claim that it is expressed as a double negative. (Of course the question itself is not in the form of a double negative. Only a verdict for the defendant would result in a double negative.) Mattson does not argue that the form of the question misled or confused the jury, and in fact the parties had ample opportunity to explain the implications of an affirmative or negative answer to the special verdict questions during closing arguments: 'In respect to every question that asks you to answer either yes or no, I want you to know that the answer 'yes' is an indication that we have proven our case and the answer 'no' is that we have not proven our case and is an answer that is beneficial to the defendants. It's as simple as that.' Tr. at 935-36 (plaintiff's counsel); *see also* Tr. at 942, 980. (App. 5)

The above rationale is a confession and avoidance. No one can read the question and not realize it is inherently confusing. The arguments of counsel do not make the question any less confusing. The decision with respect to the double negative question allows as a matter of policy all District Courts in the Seventh Circuit to utilize special verdict questions framed as double negatives.

II.

THE HOLDING IN *GEHRING V. CASE CORP.*, 43 F.3D 340 (7TH CIR. 1974), AS INTERPRETED IN THE CASE AT BAR IS IN CONFLICT WITH THE STANDARD INSTRUCTION AND THE INSTRUCTION APPROVED BY THE EIGHTH CIRCUIT

The standard instruction – Sec. 106.03 – is set forth in Sec. I *supra*. In *Ryther v. KARE 11*, 108 F.3d 832, 846 (8th Cir.) cert. denied, ___U.S.___, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997) the Eight Circuit approved the following jury instruction for Age Discrimination in Employment Act cases:

> Under federal law, it is unlawful for an employer to discriminate against an employee because of that employee's age, when the employee's age is 40 or over.
>
> In order for you to find for plaintiff, plaintiff must prove by a preponderance of the evidence that his age was a determining factor in the defendants' decision not to renew his contract.
>
> Plaintiff is not required to produce direct evidence of unlawful motive. Discrimination, if it exists, is seldom admitted, but is a fact which you may infer from the existence of other facts.

In deciding whether Plaintiff's age was a determining factor in defendants' decision, you should first consider whether plaintiff has established the following facts by a preponderance of the evidence:

First: Plaintiff was within the protected age group, that is, he was 40 years of age or over;

Second: Plaintiff's job performance was satisfactory;

Third: Plaintiff was terminated from his job when his contract was not renewed; and

Fourth: A younger person with similar credentials replaced plaintiff.

If plaintiff has failed to prove one or more of these facts, you must find for the defendants.

If plaintiff has proven these facts, he has offered evidence from which you could conclude that defendants discriminated against him because of his age.

If you find that plaintiff has proven these facts, you must consider whether defendants have produced evidence of a reason other than age for not renewing plaintiff's contract.

Defendants have offered evidence of legitimate, non-discriminatory reasons for their actions, therefore, plaintiff must prove by a preponderance of the evidence that the reasons offered by defendants are merely a pretext or cover-up for intentional age discrimination.

You should not consider whether the reasons given by defendants constitute a good or bad business decision. You may not return a verdict for plaintiff just because you may disagree with

defendants' decision or believe it was harsh or unreasonable. (Emphasis supplied)

The *Gehring* holding as interpreted by the Court of Appeals' decision in the case at bar clearly conflicts with the Eighth Circuit and the standard instruction. The Seventh Circuit decision in the case at bar holds that a jury in an age discrimination case should not get an instruction on the *McDonnell Douglas* rule. The standard instruction and the Eighth Circuit require that a jury in an age discrimination case receive such an instruction.

The Supreme Court of the United States should take this opportunity to resolve the conflict.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ROBERT E. SUTTON, S.C.
Attorney for Petitioner

In the
United States Court of Appeals
for the Seventh Circuit

No. 97-3440

JIM MATTSON,

Plaintiff-Appellant,

v.

THOMAS O. SCHULTZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 95 C 53 – **Thomas J. Curran,** *Judge.*

ARGUED APRIL 14, 1998 – DECIDED MAY 27, 1998

Before POSNER, *Chief Judge,* and CUDAHY and EASTERBROOK, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The plaintiff appeals from the denial of his motion for a new trial following a jury verdict for the defendant. The plaintiff sued his former lawyer for malpractice in pursuing the plaintiff's age discrimination complaint. This is a diversity case applying Wisconsin law.

After the plaintiff lost his job in 1989, he retained the defendant to represent him in an age discrimination case against his former employer, Green Bay Broadcasting Company. An age discrimination complaint was filed in federal court in 1990 and the matter was settled in March

1994 for $250,000. The plaintiff disputed his lawyer's fee. On that question the lawyer (the defendant here) prevailed in arbitration. (The plaintiff contested the arbitration in state court, *Mattson v. Schultz*, 549 N.W.2d 287 (Wis. Ct. App. 1996), and lost there too.) Then the plaintiff sued the lawyer (our defendant) for malpractice and intentional misrepresentation, claiming that the settlement was inadequate (allegedly $1 million would have been more appropriate) and that his lawyer committed malpractice by inducing the plaintiff to accept it. In the district court the defendant prevailed again, on both counts. Now the plaintiff appeals that decision. The supposed errors, and our discussion, only involve the malpractice count.

In accordance with Badger State precedent in legal malpractice cases, the district court conducted a "trial within a trial" to determine the lawyer's liability. *See Winskunas v. Birnbaum*, 23 F.3d 1264, 1267-68 (7th Cir. 1994); *Cook v. Continental Cas. Co.*, 509 N.W.2d 100, 104-06 (Wis. Ct. App. 1993). The plaintiff was required to show both negligent representation by his attorney, and, in order to prove injury, establish the merits of his discrimination claim. *See Winskunas*, 23 F.3d at 1267; *Glamann v. St. Paul Fire & Marine Ins. Co.*, 424 N.W.2d 924, 926 (Wis. 1988); *Lewandowski v. Continental Cas. Co.*, 276 N.W.2d 284, 287 (Wis. 1979). The special verdict form asked the jury to determine, as a threshold matter,

> Would Green Bay Broadcasting Company not have discharged James Mattson if Mr. Mattson had been younger than 40 years of age and everything else had remained the same?

R. 31, at 1. If the jury answered "yes" to this question, it was to proceed to consider whether the lawyer was negligent in representing Mattson. The jury answered this question "no," however, resolving the case in the lawyer's favor and mooting the negligence issue.

The plaintiff's principal arguments on appeal, as stated most directly in the heading of his appellate brief, are that "under the circumstances, where the district court not only conducted the 'case within a case' but submitted a special verdict question directed to the 'case within a case' it was error not to instruct the jury on the standards of a prima facie case set forth in *McDonnell Douglas v. Green*[, 411 U.S. 792, 802 (1973),] and to submit a special verdict question phrased as a double negative." Br. & App. of Pl.-Appellant 10. The question whether the jury should have been instructed on the elements of a prima facie case of age discrimination is resolved conclusively against the plaintiff's position by *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994). The plaintiff would distinguish Gehring on the basis that it was not a legal malpractice case; the plaintiff thinks that an understanding of the prima facie case would have helped the jury understand the strength of his case. But the strength of his legal malpractice case was no greater than the strength of his underlying age discrimination claim. "[T]he merits of the malpractice action depend upon the merits of the original claim." *Lewandowski*, 276 N.W.2d at 287. The principles of age discrimination law determine the proper jury instructions regarding the case within a case, *see id.* at 289, so *Gehring* controls. Since the jury found for the defendant on the threshold age discrimination question, we need not decide whether the prima

facie case might have been relevant to the issue of negligence.

The special verdict question was apparently adopted from the language of a jury instruction proposed in *Gehring*, 43 F.3d at 344, amended by adding the word "not" so that an affirmative answer would correspond to a finding for the plaintiff. The record seems to contain only a single brief discussion, between the court and *defense* counsel, regarding the polarity of the special verdict question:

> DEFENSE COUNSEL: Question number 1 appears to have almost a double negative.
>
> THE COURT: It does, counsel, and there isn't any way I could avoid it in order to allow the answer to be yes on the party having the burden.
>
> DEFENSE COUNSEL: I guess I would request then, Your Honor, maybe that be explained to them that, just that, that there's a double negative in there.
>
> THE COURT: I'm not going to get into that, Counsel. I'd lose three-quarters of the jury right there.

Tr. at 928. (The appellant did not provide the applicable portion of the transcript in his appendix (violating Circuit Rule 30), *see Palmquist v. Selvik*, 111 F.3d 1332, 1343 (7th Cir. 1997); *In re Galvan*, 92 F.3d 582, 583, 585 (7th Cir. 1996), and appellant's counsel, Robert Sutton, inaccurately represented to this court that the record shows that *he* had objected to this aspect of the special verdict question, *see* Br. & Short App. of Pl.-Appellant 3, 12; Reply Br. of Pl.-Appellant 2.)

Under Rule 49(a) of the Federal Rules of Civil Procedure, the formulation of special verdict questions is a matter within the discretion of the trial court. *See United States Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316 (7th Cir. 1988). The role of appellate review is to ensure that questions accurately, adequately and clearly state the relevant issues. Ambiguous, biased, misleading or confusing questions may warrant reversal. *See id.; see also Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 377 (7th Cir. 1996); *Umpleby v. Potter & Brumfield, Inc.*, 69 F.3d 209, 214 (7th Cir. 1995); James Wm. Moore et al., *Moore's Federal Practice* § 49.11[2][b] (3d ed. 1997). Mattson does not specify any reason why the special verdict question is defective other than the claim that it is expressed as a double negative. (Of course the question itself is not in the form of a double negative. Only a verdict for the defendant would result in a double negative.) Mattson does not argue that the form of the question misled or confused the jury, and in fact the parties had ample opportunity to explain the implications of an affirmative or negative answer to the special verdict questions during closing arguments: "In respect to every question that asks you to answer either yes or no, I want you to know that the answer 'yes' is an indication that we have proven our case and the answer 'no' is that we have not proven our case and is an answer that is beneficial to the defendants. It's as simple as that." Tr. at 935-36 (plaintiff's counsel); *see also* Tr. at 942, 980.

The defendant apparently believes that on appeal Mattson is also arguing that "the jury should not have been asked to decide the merits of the underlying age discrimination case." Br. & Supp. App. of Def.-Appellee

14. The defendant devotes more than six pages of his brief to rebutting that position. But, while that issue seems to have been pressed before the district court in the plaintiff's motion for a new trial, it is not raised in the "statement of issues for review" in the appellant's brief. The confusion evidently stems from the appellant's perfunctory cannibalizing of his memorandum of law in the trial court for use in his appellate brief. *Compare* Br. & App. of Pl.-Appellant 11-13 *with* Mem. of Pl. in Support of Mot. for New Trial 5-7.

Mattson also disputes several of the district court's evidentiary rulings. Our disposition of Mattson's challenge to the jury instructions and the form of the special verdict question makes it unnecessary to consider Mattson's contention that testimony of his expert witness and a report of the Wisconsin Equal Rights Division were improperly excluded, since this evidence only bore on whether the lawyer was negligent, and negligence is irrelevant if the age discrimination claim fails. For the same reason, we need not resolve whether Mattson should have been permitted to testify that one of Green Bay Broadcasting's co-owners told Mattson that "if I stepped down and relinquished my title that I could keep my account list, work on special projects with the station manager Mike Watts; that new fresh blood was needed." Tr. at 915. The district court sustained the defendant's objection that the statement was hearsay. According to the plaintiff, the statement was admissible as an admission by a party-opponent under Rule 801(d)(2) of the Federal Rules of Evidence. Although Mattson's former employer was not a party-opponent in this case, the trial within a trial might be viewed as a simulation of a trial in

which the employer was the opponent. If the jury in a malpractice case is charged with determining what a reasonable trier of fact would have decided if the malpractice plaintiff had been properly represented in the underlying suit, *cf. Helmbrecht v. St. Paul Ins. Co.*, 362 N.W.2d 118, 131 (Wis. 1985), then the objective of the trial within the trial would be to simulate a trial between the plaintiff and the defendant in the underlying suit. There is authority for the proposition that in a legal malpractice case involving a trial within a trial, the admissibility of evidence depends on whether the evidence would have been admissible in the underlying merits proceeding. *See Kessler v. Gray*, 143 Cal. Rptr. 496, 499 (Cal. Ct. App. 1978). The rationale would be that the evidence is not offered "to prove the truth of the matter asserted," Fed. R. Evid. 801(c), but to demonstrate what would have happened in a hypothetical trial. *See* 4 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 32.12 (4th ed. 1996). And in fact, when the underlying action has already been tried, the use of the trial transcript in a subsequent malpractice trial is well established. *See Transcraft, Inc. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 818 (7th Cir. 1994); 4 Mallen & Smith, *supra*, at § 32.21. Such a transcript might contain admissions by the defendant in the underlying action; so perhaps the alleged admission in this case should have been admitted.

But even if the testimony reporting the alleged admission was excluded erroneously, the error was harmless. Here the jury was asked to decide the merits of the underlying claim. *See, e.g., Glamann*, 424 N.W.2d at 926, 927. The proffered testimony might have been admissible

to show the lawyer's negligence, but it was not admissible to establish the merits of Mattson's discrimination claim. With respect to the discrimination claim, the value of the evidence depended on whether the jury believed not only that the co-owner made the statement, but that he meant it; so for this purpose the evidence was hearsay. *Cf. In re Air Crash Disaster*, 86 F.3d 498, 536 (6th Cir. 1996).

AFFIRMED

No. 97-3440

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES DISTRICT COURT

EASTERN District of WISCONSIN

JIM MATTSON

v.

THOMAS O. SCHULTZ

AMENDED JUDGMENT IN A CIVIL CASE

CASE NUMBER: 95-C-53

(Filed Aug. 29, 1997)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment entered on April 14, 1997 is Amended to add the following provision:

IT IS FURTHER ORDERED that a new trial is Denied to Plaintiff Jim Mattson.

Dated: August 29, 1997

SOFRON B. NEDILSKY, Clerk

/s/ D. McLeod
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JIM MATTSON,

Plaintiff, Case No. 95-C-53

v.

THOMAS O. SCHULTZ,

Defendant.

DECISION AND ORDER

(Filed Aug. 29, 1997)

Jim Mattson, the Plaintiff in the above-captioned attorney malpractice case, has moved the court for a new trial pursuant to Federal Rule of Civil Procedure 59. After accepting a $250,000.00 settlement of his age discrimination claims against a Green Bay, Wisconsin, radio station, Mattson disputed the bill he received from his attorney, Thomas Schultz. He then sued Attorney Schultz in the action now before this court. Mattson claims that the settlement was inadequate and that Schultz committed malpractice by inducing him to accept it. Mattson believes he was entitled to over a million dollars.

Employing the "trial within a trial" procedure used in Wisconsin courts, *see, e.g., Glamann v. St. Paul Fire & Marine Insurance*, 140 Wis. 2d 640, 412 N.W.2d 522 (Ct. App. 1987), *rev'd on other grounds*, 144 Wis. 2d 865, 424 N.W.2d 924 (1988), the court asked the jury to determine whether Mattson's employer had discriminated against him on the basis of age and, then, whether Attorney

Schultz was liable for malpractice. On April 9, 1997, the jury returned a special verdict finding no liability on either issue.

Federal Rule of Civil Procedure 59 gives a trial judge discretion to order a new trial. Recently, the United States Supreme Court ruled that in a case based upon diversity jurisdiction over the subject matter, such as the one at hand, a federal court must apply the law of the forum state in determining whether a new trial should be granted. *See Gasperini v. Center for Humanities, Inc.*, 116 S.Ct. 2211 (1996).

Under Wisconsin law, a trial court can grant a new trial when it is necessary "in the interest of justice." Wis. Stat. § 805.15(1). A new trial in the interest of justice requires that a different result be a probability, not only a possibility. *See Poling v. Wisconsin Physicians Service*, 120 Wis. 2d 603, 613, 357 N.W.2d 293, 299 (Ct. App. 1984). In moving for a new trial in this case, Mattson complains that certain items of evidence and testimony which could have been provided by the Plaintiff's expert, the Wisconsin Equal Rights Division investigator, and the Plaintiff himself were improperly excluded. If a trial court makes an evidentiary error, a new trial will be granted only where the improper admission or exclusion of evidence has affected the substantial rights of the movant. *See State v. Kourtidias*, 206 Wis. 2d 573, 585, 557 N.W.2d 858, 863 (Ct. App. 1996); *Heggy v. Grutzner*, 156 Wis. 2d 186, 196, 456 N.W.2d 845, 850 (Ct. App. 1990).

Having reviewed the record, the court is firmly convinced that Mattson had an adequate opportunity to present relevant and admissible evidence and argue his case

to the jury. The exclusion of evidence of which Mattson complains was based upon appropriate legal principles which were set forth on the record at trial. There is no reasonable probability that the exclusion of any evidence affected Mattson's substantial rights or that the admission of the Plaintiff's proffered evidence would have made a different result probable. Therefore, a new trial will not be granted on the ground of any evidentiary ruling.

The Plaintiff also objects to what he believes was the "sledgehammer" approach of the Defendant in his counsel's opening statement and in the examination of witnesses. To the contrary, the court's recollection of the Defendant's presentation style is that it was low key and appropriate to the circumstances. Consequently, the court sees no basis for granting a new trial on this ground.

Finally, the Plaintiff renews his argument, first made at trial, that the jury should have been instructed on the test for a *prima facie* case of employment discrimination as set forth in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). At trial, Mattson met his burden of supporting a *prima facie* case of age discrimination. However, the Defendant then met his burden of articulating a non-discriminatory reason for the radio station's firing of Mattson. It is well-established that, at this point, the *McDonnell Douglas* framework drops out of a discrimination case and the jury need be instructed and asked to render a verdict only as to the ultimate question – whether age was a factor in the employer's decision to fire the Plaintiff. *See Hill v. Burrell Communications Group, Inc.*, 67 F.3d 665, 668 (7th Cir. 1997); *Pilditch v. Board of Education of City of Chicago*, 3 F.3d 1113, 1116 (7th Cir.

1993), *cert. denied*, 510 U.S. 1116 (1994). Mattson's jury answered this question "no." Under the applicable law, Mattson was not entitled to a jury instruction or special verdict interrogatory based on the *McDonnell Douglas* framework, so a new trial will not be granted on this ground.

ORDER

For these reasons, the court **ORDERS** that the Plaintiff's "Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure" (filed April 28, 1997) **IS DENIED.**

IT IS FURTHER ORDERED that the Clerk of Court shall amend the judgment in this case entered on April 14, 1997, to add the following provision:

IT IS FURTHER ORDERED that a new trial is denied to Plaintiff Jim Mattson.

Done and Ordered in Chambers at the United States Courthouse, Milwaukee, Wisconsin, this 29th day of August, 1997.

/s/ Thomas J. Curran
THOMAS J. CURRAN
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES MATTSON,

Plaintiff,

vs. Case No. 95-C-53

THOMAS O. SCHULTZ,

Defendant.

MOTION FOR NEW TRIAL

(Filed Apr. 28, 1997)

NOW COMES the plaintiff, James Mattson, by his attorney, Robert E. Sutton, and pursuant to Rule 59 of the Federal Rules of Civil Procedure respectfully moves for an Order granting a new trial for the following reasons:

(1) The court erroneously excluded the underlying probable cause finding of the Equal Rights Division prepared by the witness, Pamela Meulemanns.

(2) The court erroneously struck critical testimony of the expert witness, Attorney Anne Shindell.

(3) The Court erroneously excluded the testimony of the plaintiff, James Mattson, regarding the discriminatory statements directed to him by the owner of the Green Bay Broadcasting Company, Mr. Baird.

(4) The court failed to give instructions to the jury concerning the elements of a prima

facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

(5) The court erred in presenting Question 1 to the jury.

(6) The court erred in presenting any questions to the jury on the "case within a case"; that is, the underlying age discrimination case.

(7) The court erred in not submitting a question to the jury on whether or not the defendant made a representation to the plaintiff that there had been a change in the law on the burden of proof and whether that representation was false.

(8) The verdict of the jury was contrary to the great weight of the evidence and with respect to the questions concerning the representations made by the defendant Schultz to the plaintiff contrary to admissions by the defendant Schultz during his testimony.

(9) In the interests of justice.

Dated at Milwaukee, Wisconsin, this 28th day of April, 1997.

/s/ Robert E. Sutton
Robert E. Sutton
Attorney for Plaintiff

2631 N. Downer Avenue
Milwaukee, WI 53211
(414) 961-0802

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JAMES MATTSON,

Plaintiff, Case No. 95-C-53

vs.

THOMAS O. SCHULTZ,

Defendant.

SPECIAL VERDICT

We, the Jury in the above-entitled case, having been duly impaneled and sworn to try the issues, find for our special verdict as follows:

QUESTION NO. 1:

Would Green Bay Broadcasting Company not have discharged James Mattson if Mr. Mattson had been younger than 40 years of age and everything else had remained the same?

Yes _ No X

If you have answered "yes" to Question No. 1, then answer Question No. 2. If you have answered "no" to Question No. 1, then you need not answer Questions 2, 3, 4 and 5.

QUESTION NO. 2:

Did the defendant Thomas O. Schultz fail to exercise that degree of care, skill, and judgment which is usually exercised under like or similar circumstances by lawyers licensed to practice in this state?

Yes _ No _

If you have answered "yes" to Question No. 2, then answer Question No. 3. If you answered "no" to Question No. 2, then you need not answer Questions 3, 4 and 5.

QUESTION NO. 3:

(a) Was the failure of the Defendant Mr. Schultz to exercise that degree of care a cause of any damage to the Plaintiff Mattson?

Yes _ No _

(b) Was Plaintiff James Mattson Negligent in failing to exercise that degree of care regularly exercised by a reasonable client under the same or similar circumstances.

Yes _ No _

(c) Was such failure a cause of damages, if any, that he sustained?

Yes _ No _

(d) What percentage, or part of 100%, of the negligence do you find?

a. James Mattson _____%

b. Thomas O. Schultz _____%

TOTAL 100%

QUESTION NO. 4:

What sum of money, if any, would a reasonable jury have awarded James Mattson for back wages and benefits on his age discrimination claim?

$\$$_____

If you answered Question No. 4, then answer this question.

QUESTION NO. 5:

Was the Green Bay Broadcasting Company's action "willful?"

Yes _ No _

QUESTION NO. 6:

(a) Did Thomas Schultz make the representation of fact that Federal Judge Rudolph Randa said the "$250,000 settlement was fair and reasonable?"

Yes _ No X

If you answer "yes" to Question 6(a), then answer this question.

(b) Was such representation untrue?

Yes _ No _

If you answered "yes" to both Question 6(a) and 6(b), then answer this question.

(c) Did Thomas Schultz make the representation as a statement based on his personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of such a representation?

Yes _ No _

QUESTION NO. 7:

(a) Did Thomas Schultz make the representation of fact that Magistrate Bittner would say the same thing about the settlement?

Yes _ No X

If you answered "yes" to Question 7(a), then answer this question.

(b) Was such representation untrue?

Yes _ No _

If you answered "yes" to both Questions 7(a) and 7(b), then answer this question.

(c) Did Thomas Schultz make the representation as a statement based on his personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of such a representation?

Yes _ No _

QUESTION NO. 8:

(a) Did Thomas Schultz make the representation of fact that, in the event of trial, it would be the position of the Green Bay Broadcasting Company that Leana Ware would testify against Pamela Muelmans, the investigator who had found probable cause:

Yes _ No X

If you answer "yes" to Question 8(a), then answer this question.

(b) Was such representation untrue?

Yes _ No _

If you answered "yes" to both Questions 8(a) and 8(b), then answer this question.

(c) Did Thomas Schultz make the representation as a statement based on his personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of such a representation?

Yes _ No _

QUESTION NO. 9:

(a) Did Thomas Schultz make the representation of fact that the owners of Green Bay Broadcasting would bankrupt Green Bay Broadcasting if Jim Mattson won a large judgment at trial?

Yes _ No X

If you answered "yes" to Question 9(a), then answer this question.

(b) Was such representation untrue?

Yes _ No _

If you answered "yes" to both Questions 9(a) and 9(b), then answer this question.

(c) Did Thomas Schultz make the representation as a statement based on his personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of such a representation?

Yes _ No _

QUESTION NO. 10:

(a) Did Thomas Schultz make the representation of fact that if James Mattson would accept the settlement he would not have to worry about Schultz's fees . . . "my fees won't be a problem?"

Yes _ No X

If you answer "yes" to Question 10(a), then answer this question.

(b) Was such representation untrue?

Yes _ No _

If you answer "yes" to both Questions 10(a) and 10(b), then answer this question.

(c) Did Thomas Schultz make the representation as a statement based on his personal knowledge or in circumstances in which he necessarily ought to have known the truth or untruth of such a representation?

Yes _ No _

If you answer "yes" to Questions 6(c), or 7(c), or 8(c), or 9(c), or 10(c), then answer this question.

QUESTION NO. 11:

What amount of money would compensate the Plaintiff for any intentional misrepresentation?

$_____

If you answer Question 11, then answer the following question.

QUESTION NO. 12:

Did Thomas Schultz act maliciously toward James Mattson or in an intentional disregard of the rights of James Mattson?

Yes _ No _

If you answer "yes" to Question 12, then answer the following question.

QUESTION NO. 13:

What sum of money, if any, do you assess against Thomas Schultz as punitive damages?

$_____

We, the jury unanimously find the facts to be as indicated in our answers to the foregoing questions.

Dated this 9th day of April, 1997.

/s/_____ /s/_____

/s/_____ /s/_____

/s/_____ /s/_____

/s/_____ /s/_____

Now, the plaintiff bases its primary case in this lawsuit on Age Discrimination in Employment Act, called ADEA. That act provides in pertinent part:

That it shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age.

The prohibitions contained in the Age Discrimination in Employment Act forbid discrimination against individuals who are at least 40 years old. In other words, the act makes it unlawful for an employer to discriminate against an individual 40 or older because of his age.

Now, the plaintiff, James Mattson, claimed that the Green Bay Broadcasting Company discriminated against him because of his age in violation of Title 29 of Section 623(f) of the United States Code. More specifically, the plaintiff alleged that the Green Bay Broadcasting Company unlawfully terminated him because of his age.

The Green Bay Broadcasting Company contended that the plaintiff, James Mattson, was lawfully terminated from his job due to his unsatisfactory job performance and for good cause. More specifically, the Green Bay Broadcasting Company claimed that James Mattson was discharged because he was insubordinate and his job performance was unsatisfactory. The Green Bay Broadcasting Company contended that the termination had nothing whatsoever to do with James Mattson's age.

James Mattson then must establish by a preponderance of the evidence that age was a determinative

factor in the action taken by the Green Bay Broadcasting Company. James Mattson need not establish that age was the sole factor motivating Green Bay Broadcasting Company. Age may be one of a number of factors contributing to Green Bay Broadcasting Company's action. James Mattson demonstrates that age was a determinative factor if he shows that but for age the adverse action would not have happened, that is, but for his age he would not have been fired.

Now, if James Mattson persuades you by a preponderance of the evidence that the Green Bay Broadcasting Company discharged him because of his age, then you must consider the defense that the action was based upon a reasonable factor other than age. As you consider this, remember that the Green Bay Broadcasting Company bears only the burden of articulating a legitimate, nondiscriminatory reason for its actions. The Green Bay Broadcasting Company does not have to persuade you of this fact by a preponderance of the evidence; rather, it need only produce enough evidence to create a genuine issue of fact in your mind.

Here, the good cause or reasonable factor other than age alleged in the Green Bay Broadcasting Company, is as I stated before insubordination – well, let's see here -insubordination and his job performance being unsatisfactory.

Now, if the Green Bay Broadcasting Company has satisfied its burden of production by proffering evidence tending to show a nondiscriminatory reason for the challenged action, the plaintiff may introduce evidence that

the Green Bay Broadcasting Company's articulated reason for its action was nothing more than a pretext for age discrimination. In other words, James Mattson may introduce evidence to show that Green Bay Broadcasting Company's reason is not the true reason why it took adverse action against James Mattson, that such reason is unworthy of belief and the true reason for the adverse action was age discrimination.

Now, when you consider James Mattson's evidence that the reason advanced by the Green Bay Broadcasting Company is a pretext, keep in mind that the relevant question is whether the Green Bay Broadcasting Company's reason was not the real reason for its action. The question is not whether Green Bay Broadcasting Company's reason showed poor or erroneous judgment. You are not to judge the Green Bay Broadcasting Company's wisdom. The Green Bay Broadcasting Company would be entitled to make its decision for a good reason, a bad reason or no reason at all, so long as the decision was not motivated by unlawful discrimination. However, you may consider whether the Green Bay Broadcasting Company's reason is merely a cover-up for discrimination. In doing so, you may consider whether the asserted reason comports with the Green Bay Broadcasting Company's own policies and rules and whether such policies and rules are applied uniformly. You also should carefully evaluate any subjective reasons the Green Bay Broadcasting Company has asserted for taking the action against James Mattson that it did in deciding whether James Mattson has met his burden of proof.

Now, it is James Mattson's burden to persuade you, by a preponderance of the evidence, that the Green Bay

Broadcasting Company took this adverse action against him because of his age. Now, if you do not believe the Green Bay Broadcasting Company's explanation of its action, then you may infer, but you need not infer, that James Mattson was satisfied – has satisfied his burden of proof that the Green Bay Broadcasting Company intentionally discriminated against him because of his age.

I instruct you that the purpose of the ADEA is to make persons whole for injuries suffered as a result of unlawful employment discrimination. Under the ADEA a successful plaintiff is entitled to recover lost wages and benefits, including any increases in wages. The amount of wages and benefits due is determined by calculating the amount that would have been earned from the date of James Mattson's discharge to February 15, 1994.

Now, a person who has been damaged may not recover for losses that he knows or should have known could have been reduced by reasonable efforts.

Now, if you find that a reasonable person would have taken steps to reduce the damages, and if you find that James Mattson did not take such steps, then you should not include as damages any amount which could have been avoided by James Mattson. If a reasonable person would have taken steps to reduce loss under all of the circumstances existing in this case, then James Mattson's failure to so act may not be considered by you in – may be considered by you in determining James Mattson's damages.

MR. SUTTON: Your Honor, you read that sentence incorrectly.

THE COURT: I'll read it over again. If a reasonable person would not have taken steps to reduce loss under all of the circumstances existing in this case, then James Mattson's failure to so act may not be considered by you in determining James Mattson's damages.

The burden of proof is upon Thomas Schultz to satisfy you to a reasonable certainty by the greater weight of the credible evidence that James Mattson should have taken steps to reduce his loss and failed to do so.

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(2)

Supreme Court, U.S.
FILED
SEP 21 1998
CLERK

No. 98-314

In The

Supreme Court of the United States

October Term, 1997

JIM MATTSON,

Petitioner,

vs.

THOMAS O. SCHULTZ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTION PRESENTED

Is a trial court required in all age discrimination cases to instruct the jury on the *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973) elements of a *prima facie* case?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Reasons for Denying the Writ	1
I. Courts Are Not Required To Instruct Juries On The *McDonnell Douglas* Elements Of A *Prima Facie* Case.	1
II. A Rule Requiring Jury Instructions To Set Forth In Detail The *McDonnell Douglas Prima Facie* Elements May Only Serve To Confuse And Mislead Juries.	4
III. There Is No Conflict Within The Court Of Appeals Regarding The Question Presented.	6
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Achor v. Riverside Golf Club, 117 F.3d 339 (7th Cir. 1997) 2, 3

Cabrera v. Jakabovitz, 24 F.3d 372 (2nd Cir. 1994), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205, *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994) 5, 8, 10

Gehring v. Case Corp., 43 F.3d 340 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S. Ct. 2612 (1995) 3, 9

Lang v. Star Herald, 107 F.3d 1308 (8th Cir. 1997) .. 7, 8

Loeb v. Textran, Inc., 600 F.2d 1003 (1st Cir. 1979) .. 3

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) ..... i, 1, 2, 3, 4, 5, 6, 8

Merkel v. Scovill, Inc., 787 F.2d 174 (6th Cir. 1986) . 9

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306 (10th Cir. 1990) 5, 9

Nelson v. Green Ford, Inc., 788 F.2d 205 (4th Cir. 1986) 8

Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471 (5th Cir. 1992), *cert. denied*, 507 U.S. 909, 113 S. Ct. 1253 (1993) 8

Table of Cited Authorities

Page

Postal Service v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983) 3, 5

Seman v. Copley Cement Co., 26 F.3d 428 (3rd Cir.) . 8

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 1, 2, 3, 4

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Williams v. Valentec Kisco, Inc., 964 F.2d 723 (8th Cir. 1992) 7

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REASONS FOR DENYING THE WRIT

I.

COURTS ARE NOT REQUIRED TO INSTRUCT JURIES ON THE *McDONNELL DOUGLAS* ELEMENTS OF A *PRIMA FACIE* CASE.

This Court has set forth a model for analyzing claims of discrimination for cases where there is no direct evidence of discriminatory intent. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993). The first step in the model requires a plaintiff to carry the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. Thereafter, the model employs a burden-shifting methodology as between the plaintiff and the defendant, but the defendant's burden is limited to producing evidence that the adverse employment actions were taken for a legitimate nondiscriminatory reason. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094. The *McDonnell Douglas-Burdine-Hicks* methodology does not relieve the plaintiff of the burden to prove intentional discrimination:

> It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

St. Mary's Honor Center v. Hicks, 509 U.S. at 507, 113 S. Ct. at 2747, quoting *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093.

In *Burdine*, this Court stated as follows:

> The allocation of the burdens and the creation of a presumption by the establishment of a *prima facie* case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.

Burdine, 450 U.S. 255, n.8, 101 S. Ct. at 1094, n.8.

Thus, the *prima facie* presumption is a *procedural* device, designed only to establish an order of proof and production. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 521, 113 S. Ct. at 2755.

On this Petition, the plaintiff-petitioner seeks a rule requiring trial courts to give jury instructions which detail the *prima facie* case elements of the *McDonnell Douglas-Burdine-Hicks* model. Such a rule has already been rejected by this Court, as well as by many of the circuit courts of appeals. The plaintiff-petitioner has cited no jurisdiction where such a rule has been adopted. The petitioner has similarly not established that there is any conflict within the circuits.[1]

Application of the burden-shifting rules of *McDonnell Douglas* generally presents a question of law for the court. B. Lindemann & Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 38, BNA (3d ed. 1996). This Court has stressed that the elements that make up a *prima facie* case are for the judge, not the jury, *Achor v. Riverside Golf Club*, 117 F.3d 339, 341 (7th

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1. While arguing for the absolute rule that would in all cases require a *McDonnell Douglas* jury instruction, the petitioner makes no effort to analyze the jury instructions that were actually given in this case. The petitioner has made no effort to explain how he was prejudiced by the instructions that were given.

Cir. 1997) (citations omitted) and the burden-shifting model does not apply to the jury's evaluation of the evidence at trial. *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S. Ct. 2612 (1995) citing *Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481 (1983) and *Burdine*, 450 U.S. at 256, 101 S. Ct. at 1095. It is the judge, not the jury who determines whether the plaintiff has carried the burden on the *prima facie* case, and whether the defendant has produced an age neutral explanation. *Gehring*, 43 F.3d at 343. Once the judge has made this decision, it is unnecessary to have the jury go back through these same steps. *See Achor*, 117 F.3d at 341. The First Circuit Court of Appeals has concluded that the *McDonnell Douglas* framework should be monitored by the judge, not the jury:

> *McDonnell Douglas* is to a large extent an analytical framework enunciated *post hoc*, in light of a given set of facts, to give judges a method of organizing evidence and assigning the burdens of production and persuasion in a discrimination case. In light of this and the fact that the defendants' burden is one of production rather than of persuasion, only the factual determinations necessary to the underlying rationale of *McDonnell Douglas* need be made by the jury — the burden-shifting can and should be monitored by the judge.

Loeb v. Textran, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

Further, once the judge makes this decision, the *prima facie* presumption "drops from the case," *Burdine*, 450 U.S. at 255 (n.10), 101 S. Ct. at 1095 (n.10); "drops out of the picture," *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749; is "no longer relevant" and should not be "resurrected." *Id.* 509 U.S. at 510-511, 113 S. Ct. at 2748-49. *See also Aikens*, 460 U.S. at 714-715, 103 S. Ct. at 1481.

In this case, the *prima facie* presumption had its intended effect by forcing the employer to come forth with its response. *See Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094-1095. Accordingly, any presumption created by the *prima facie* case simply dropped out of the picture and was not to be considered by the jury. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749. The jury then proceeded to the ultimate question of whether the plaintiff proved intentional discrimination. The jury determined that there was no discrimination, and this decision should not be upset.

II.

A RULE REQUIRING JURY INSTRUCTIONS TO SET FORTH IN DETAIL THE *McDONNELL DOUGLAS PRIMA FACIE* ELEMENTS MAY ONLY SERVE TO CONFUSE AND MISLEAD JURIES.

When fashioning jury instructions, a court should attempt to simplify the law so that a jury can focus on the ultimate issue of discrimination. Plaintiff-petitioner's rule that would require a detailed, cumbersome explanation of the *prima facie* elements and the burden-shifting methodology may be confusing to juries and may actually mislead them. The Tenth Circuit Court of Appeals has stated that a jury is not well-suited to understand the shifting burdens of *McDonnell Douglas*:

> While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury.

> The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.

Messina v. Kroblin Transportation Systems, Inc., 903 F.2d 1306, 1308 (10th Cir. 1990).

The Second Circuit has criticized lawyers who continue to request the *McDonnell Douglas* framework jury instruction:

> Though we have previously pointed out that the jury trial context creates problems that do not arise in bench trials [citation omitted] lawyers are still prone to include in requested jury charges language that was written by appellate courts in the context of bench trials — language that is at best irrelevant, and at worst misleading to a jury.

Cabrera v. Jakabovitz, 24 F.3d 372, 380, *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994).

This court has recognized that triers of fact are faced with "sensitive" and "difficult" questions in discrimination cases. *Aikens*, 460 U.S. at 716, 103 S. Ct. at 1482. Therefore, the inquiry should not be made "even more difficult by applying legal rules which were devised to govern 'the basic allocation' of burdens and orders of presentation of proof." *Id.* citing *Burdine*, 450 U.S. at 252, 101 S. Ct. at 1093.

III.

THERE IS NO CONFLICT WITHIN THE COURT OF APPEALS REGARDING THE QUESTION PRESENTED.

In an effort to support a reason for review, petitioner advances a perceived "conflict" between the Seventh and Eighth Circuits. No such conflict exists. The expansive rule that juries must always be instructed on the *McDonnell Douglas prima facie* elements and presumptions, as advanced on this petition by petitioner, is not supported by Eighth Circuit cases. Just because a court may have given such an instruction does not mean that the instructions would always be appropriate, as petitioner suggests. Petitioner's reliance upon just a select few Eighth Circuit cases does not take into account the Eighth Circuit's recognition and well-established rule that a jury need *not* be advised of the burdens of proof as set forth in *McDonnell Douglas*. The Eighth Circuit has stated as follows:

> Williams then argues that Instructions 16 and 20 on the section 1981 race discrimination claim were erroneous because they did not properly advise the jury of the burdens of proof as set out in *McDonnell Douglas*. . . .
>
> The Supreme Court has stressed that the *McDonnell Douglas* stages of proof method was "never intended to be rigid, mechanized, or ritualistic," *Aikens*, 460 U.S. at 715, 103 S.Ct. at 1482 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978)). Likewise, we have held that the *McDonnell Douglas* "ritual is not well suited as a detailed instruction to the jury" and adds little understanding to deciding the ultimate

> question of discrimination. *Grebin v. Sioux Falls Indep. Sch. Dist.*, 779 F.2d 18, 20 (8th Cir. 1985). *See also Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016-17 (1st Cir. 1979). We pointed out in *Grebin* that the *McDonnell Douglas* analysis was articulated in a court-tried case, and observed that it is far more applicable to a bench trial than to deliberations of a jury. Once a full record has been developed, as it was in this case, the factfinder should proceed to the specific question of whether the action of the employer was discriminatory. *See Aikens*, 460 U.S. at 715, 103 S.Ct. at 1481.

Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992).

More recently, in *Lang v. Star Herald*, 107 F.3d 1308 (8th Cir. 1997), a pregnancy discrimination case, the Eighth Circuit stated as follows:

> Eighth Circuit Model Civil Jury Instruction § 5.91, on which Lang relies, is fully consistent with the requirement that Lang initially establish her prima facie case. True, as Lang points out, the instruction does not explain the *McDonnell Douglas* framework, including the prima facie elements. *See* Manual of the Model Civil Jury Instructions for the District Courts of the Eighth Circuit § 5.91 (1995). *Reference to this complex analysis is not necessary, however, or even recommended. Grebin v. Sioux Falls Indep. Sch. Dist.* No. 49-5, 779 F.2d 18, 20 (8th Cir. 1985); *see also Ryther*, at 844-45 (seven active judges of the en banc court joining Part IIA of Judge Loken's separate opinion, which said district courts are not "constrained to instruct how

> discrimination can be proved" and which rejected *Kehoe v. Anheuser-Busch, Inc.*, 96 F.3d 1095, 1105 (8th Cir. 1996), which had stated that "the district courts in this circuit are constrained to instruct juries on the elements of the prima facie case.") *The burden-shifting analysis is simply a procedural framework that progressively focuses the inquiry on the question of whether a material issue of discrimination in fact exists. See Hicks*, 509 U.S. at 506-10, 113 S.Ct. at 2746-49. Model instruction § 5.91 properly focuses on the single ultimate factual issue for the jury — whether the plaintiff is a victim of intentional discrimination — and does not conflict with the requirement that Lang must initially establish a prima facie case to avoid summary judgment or judgment as a matter of law when the case is tried.

Lang v. Star Herald, 107 F.3d at 1312 (emphasis added).

The Eighth Circuit is not alone in its conclusion that it is not necessary, or even recommended, that courts instruct juries on the *McDonnell Douglas prima facie* elements. *See e.g., Cabrera v. Jakabovitz*, 24 F.3d 372 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994); *Seman v. Copley Cement Co.*, 26 F.3d 428 (3rd Cir.); *Nelson v. Green Ford, Inc.*, 788 F.2d 205, 206 (4th Cir. 1986) ("it is not the purpose of [jury] instructions to immerse the jury in the *McDonnell Douglas* scheme of proof with all its shifting burdens and its subtle variations"); *Woodhouse v. Magnolia Hospital*, 92 F.3d 248, 257 (5th Cir. 1996) ("it is improper to instruct a jury on the elements of the prima facie case"); *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1478 (5th Cir. 1992), *cert. denied*, 507 U.S. 909, 113 S. Ct. 1253 (1993) ("[i]nstructing the jury on the elements of a prima facie case, presumptions, and the shifting

burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age"); *Merkel v. Scovill, Inc.*, 787 F.2d 174, 177 (6th Cir. 1986) ("we rejected long ago attempts to mechanically apply to ADEA proceedings the evidentiary standards enumerated in *McDonnell Douglas*"); *Gehring v. Case Corp.*, 43 F.3d at 343 ("the *only* question the jury need answer — is whether the plaintiff is a victim of intentional discrimination"); *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("the presumptions and burdens inherent in the McDonnell Douglas formulation drop out of consideration when the case is submitted to the jury on the merits").

Finally, the petitioner advances the rule that juries in all age discriminations should receive the "standard" jury instruction contained in § 106.03 of C. Devitt *et al.*, FEDERAL JURY PRACTICE AND INSTRUCTION-CIVIL, West Publishing Co. (4th ed. 1987). According to its authors, however, this very instruction should be given with caution:

> Caution is urged when submitting the type of instruction contained in the text.

Id. (Supp. 1997), p. 236. The Second Circuit questioned the use of such "standard" jury instructions:

> 5. Some jury instruction manuals, however, either omit the burden-shifting language of *McDonnell Douglas* and *Burdine*, *see, e.g.*, 3 Edward J. Devitt et al., Federal Jury Practice and Instructions: Civil § 104.04, notes (Supp. 1993), or specifically recommend against its inclusion, *see, e.g.*, Manual of Modern Civil Jury Instructions for the District Courts of the Eighth Circuit 74 (West 1993) ("It is

> unnecessary and inadvisable to instruct the jury regarding the three-step analysis of *McDonnell Douglas*.")

Cabrera v. Jakabovitz, 24 F.3d 372, 381, n.5 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205 (1994).

Simply put, there is no support in the law for the rule advanced by the petitioner.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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